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HO YEE ONN v. PP

COURT OF APPEAL, PUTRAJAYA
MARY LIM JCA
ZABARIAH MOHD YUSOF JCA
VAZEER ALAM MYDIN MEERA JCA
B [CRIMINAL APPEAL NO: S-05(M)-331-06-2018]
18 DECEMBER 2019

CRIMINAL LAW: *Dangerous Drugs Act 1952 – Section 39B(1)(a) – Appeal against conviction and sentence – Defence of innocent carrier – Whether wilful*
C *blindness made out – Whether amount of drugs ipso facto deprived accused of defence – Whether existence of third person other than accused made known at earliest opportunity – Whether failure to investigate third person explained – Invocation of double presumption – Whether unconstitutional in light of Alma Nudo Atenza v. PP – Whether rendered conviction unsafe – Dangerous Drugs Act 1952, s. 37(d) &*
D *(da)*

CRIMINAL PROCEDURE: *Appeal – Appeal against conviction and sentence – Charge under s. 39B(1)(a) of Dangerous Drugs Act 1952 – Defence of innocent carrier – Whether wilful blindness made out – Whether amount of drugs ipso facto deprived accused of defence – Whether existence of third person other than accused*
E *made known at earliest opportunity – Whether failure to investigate third person explained – Invocation of double presumption – Whether unconstitutional in light of Alma Nudo Atenza v. PP – Whether rendered conviction unsafe – Dangerous Drugs Act 1952, s. 37(d) & (da)*

F The appellant landed at Kota Kinabalu International Airport ('KKIA') from Kuala Lumpur. PW1, a customs officer, upon observing suspicious behaviour of the appellant, saw the appellant walking towards carousel D and reclaiming a plastic wrapped box ('P33') from the carousel. Upon seeing a suspicious image inside P33 whilst being scanned, another customs officer, PW2, directed the appellant to bring P33 to another counter for examination.
G When P33 was unwrapped, there were two packets of 'Snek Mi' and when taken out, PW2 saw several other packets wrapped in newspaper inside P33. The appellant, however, refused to unwrap the newspaper packing, explaining that P33 was not his. Following his refusal, PW2 checked the appellant's boarding pass ('P7') and the luggage tag ('P47') affixed to P33 and
H found that P33 was registered under a different name. On further inquiry by PW3, the appellant stated that P33 looked similar to his box and said that his box could possibly be at the conveyor belt. PW3 then escorted the appellant back to carousel D, supposedly to retrieve his box but there was none. Subsequently, the packages in the newspaper were unwrapped and
I found to contain clear crystal substances which were later confirmed to be methamphetamine. After being cautioned, the appellant replied that P33 did

not belong to him but to his friend, Woo Kah Paul ('Woo') who, according to the appellant, was outside the arrival hall. PW6, PW3's supervisor, confirmed that the luggage tax affixed to P33 was in Woo's name. PW7, the investigation officer, confirmed the existence of Woo. The appellant was thus charged together with Woo, still at large, with the offence of trafficking in dangerous drugs in contravention of s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') punishable under s. 39B(2) of the DDA read with s. 34 of the Penal Code. The trial judge found that the appellant had direct custody and control over P33 and the facts coupled with the behaviour of the appellant implied that the appellant had knowledge of the contents of P33. The inference was made as the appellant had no reason to go to carousel D as he did not check-in any luggage. The trial judge went on to presume that the appellant was trafficking under s. 37(da) of the DDA in light of the weight of the drugs recovered. Consequently, the trial judge found a *prima facie* case was established by the prosecution against the appellant as per the charge and that the presumptions had not been rebutted. The appellant was thus ordered to enter his defence on the charge. The appellant's defence was that P33 did not belong to him, but to Woo, who had travelled with him on the same flight. He stated that, on his way out of KKIA, he received a call from Woo, who told him that he had came out of the arrival exit and had forgotten to reclaim his box, P33, at the conveyor belt and asked the appellant's favour to pick it up for him. The appellant claimed that he had informed the customs officer that he wanted to call Woo and that Woo was outside the arrival hall, waiting for him. This, he said, was ignored and the officer did not go out to look for Woo. At the end of the trial, the High Court found that the appellant had failed to rebut the presumption on a balance of probabilities and to raise a reasonable doubt on the prosecution's case. The appellant was thus convicted and sentenced to the mandatory death penalty. Aggrieved with both conviction and sentence, the appellant appealed.

Held (allowing appeal; setting aside decision of High Court)
Per Mary Lim JCA delivering the judgment of the court:

(1) The role played by Woo was a matter which was directly related and relevant to the defence of innocent carrier. Having called for the appellant's defence, it was the trial judge's duty to evaluate the defence of innocent carrier to see if there was in fact evidence to support that defence. What the trial judge did instead was to focus on the issue of common intention to the exclusion of consideration of this defence. The trial judge had erroneously failed in that regard, occasioning a miscarriage of justice. (para 43)

(2) Since the defence was that he was an innocent carrier, the trial judge was obliged to consider the issue of deliberate action and whether there was wilful blindness. The defence of innocent carrier refers to a state of affairs or a set of factual circumstances where the appellant acknowledges that he was carrying P33 or had explained how he had come to be carrying P33, but had denied knowledge of the drugs found in P33. The trial judge was required to examine the full circumstances to see if the defence had been borne out by the evidence led and relied on by both the prosecution and the appellant, and that the appellant had not been wilfully blind. The amount of drugs recovered did not *ipso facto* deprive the appellant of this defence. (para 45)

(3) Evidence showed that the appellant had made known the existence of Woo at the earliest opportunity and had done so repeatedly. The appellant had Woo's hand phone number on his own hand phone and had requested to call Woo which was refused and for which no explanation was proffered. The time lapse and the multiple occasions where the appellant raised the matter of Woo clearly indicated that the customs officers were aware very early of the existence of Woo and had ample opportunity to verify the appellant's claim, yet, failed to do so with no explanation given. In fact, this trail of relevant evidence was not investigated till some four months later. Therefore, the submission that the appellant had only raised the matter of Woo somewhat late was clearly not supported at all by evidence. (paras 47 & 48)

(4) The presence of a third person other than the appellant was not verified and this was highly relevant to the defence of innocent carrier. The trial judge had clearly misunderstood the reason why the appellant was checking P47 against P7 and why he was escorted back to carousel D by PW3. The explanation offered by the appellant as to why he was checking P47 against P7; that it was to confirm the flight details were plausible and reasonable. As for going back to carousel D, the appellant had explained that it was to check if there was any other box belonging to Woo, not to check for a box belonging to him since he did not check-in any. (paras 49-51)

(5) The very defence of the appellant was that he was asked to retrieve P33 by Woo. Woo had called the appellant after he had left the security clearance area and the conversation was confirmed by PW1. Further, the prosecution had led evidence that the appellant did not check-in any luggage and therefore, P33 was not checked-in by the appellant. At the very least, P33 belonged to Woo. The issue was whether the appellant was aware of the contents of P33 or had knowledge of the drugs seized, the very material question that the trial judge was required to resolve. The appellant could not be said to have been wilfully blind as to the obvious and to the contents of P33. Further, no common intention was proved. (paras 51 & 52)

(6) There was an application and reliance on the double presumptions by the trial judge, *ie*, on s. 37(d) and s. 37(da) of the DDA. Following the decision of the Federal Court in *Alma Nudo Atenza v. PP* declaring s. 37A of the DDA to be unconstitutional, the charge of trafficking could not stand. The trial judge had made inconsistent findings on possession and trafficking, using the terms interchangeably to the prejudice of the appellant. The law requires the trial judge to make definitive and certain findings on the element of possession and trafficking at the end of the prosecution's case. (paras 41 & 54)

(7) As for the alternative charge under s. 39A(2) of the DDA, the appellant had made out the defence of innocent carrier both on the facts and in law. The appellant not only rebutted the presumption under s. 37(d) of the DDA but had successfully demolished the prosecution's case. The conviction was thus unsafe. The appellant was accordingly acquitted and discharged. (paras 42 & 55)

Case(s) referred to:
Alma Nudo Atenza v. PP & Another Appeal [2019] 5 CLJ 780 FC ***(foll)***
Felix King v. PP [2019] 2 CLJ 209 CA ***(refd)***
Ling Peek Hoe & Anor v. Ding Siew Ching & Another Appeal [2017] 7 CLJ 641 FC ***(refd)***
Muhammed Hassan v. PP [1998] 2 CLJ 170 FC ***(refd)***
Munuswamy Sundar Raj v. PP [2016] 1 CLJ 357 FC ***(refd)***
PP v. Dato' Yap Peng [1987] 1 CLJ 550; [1987] CLJ (Rep) 284 SC ***(refd)***
PP v. Herlina Purnama Sari [2016] 1 LNS 1855 FC ***(refd)***
Saeid Reza Mohammadi Mohammad lwn. PP [2016] 1 LNS 303 CA ***(refd)***
Seyedalireza Seyedhedayatollah Ehteshamiardestani v. PP [2014] 4 CLJ 406 CA ***(refd)***
Soorya Kumar Narayanan & Anor v. PP [2012] 9 CLJ 141 FC ***(refd)***
Teng Howe Sing v. PP [2009] 3 CLJ 733 FC ***(dist)***
Veheng Global Traders Sdn Bhd v. AmGeneral Insurance Bhd & Anor And Another Appeal [2019] 7 CLJ 715 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 259
Dangerous Drugs Act 1952, ss. 37(d), (da), 37A(2), 39A(2), 39B(1)(a), (2)
Penal Code, s. 34

For the appellant - Hamid Ismail; M/s Hamid & Co
For the respondent - Mohd Zain Ibrahim; DPP

[Editor's note: For the High Court judgment, please see PP v. Ho Yee Onn [2018] 1 LNS 1246 (overruled).]

Reported by S Barathi

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JUDGMENT

Mary Lim JCA:

Introduction

[1] The appellant was charged together with another person named Woo
B Kah Paul, still at large, with the offence of trafficking in dangerous drugs in contravention of s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act), punishable under s. 39B(2) of the Act read with s. 34 of the Penal Code. The learned judge called for defence on the charge preferred against the appellant at the end of the prosecution case. At the end of trial, the learned judge found
C the appellant guilty as charged, and proceeded to convict and sentence the appellant to the mandatory death penalty. Aggrieved with both the conviction and sentence, the appellant appealed.

[2] Upon hearing and after carefully considering the oral and written submissions of both learned counsel against the reasons for decision of Her
D Ladyship and the records of appeal, we, unanimously allowed the appeal. We found the conviction unsafe, be it under the original charge under s. 39B(1)(a) of the Act or the alternative charge of possession under s. 39A(2) of the same offered by the learned DPP. Consequently, we allowed the appeal, set aside the decision of the High Court together with the conviction
E and sentence, and, acquitted and discharged the appellant.

[3] These are our full reasons for the decision.

Charge

[4] The charge against the appellant reads as follows:

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> Bahawa kamu bersama-sama dengan Woo Kah Paul No. K/P: 960110-14-6325 yang masih lagi bebas pada 21 Mei 2016 jam lebih kurang 03:40 petang di Balai Ketibaan 2, Terminal Lapangan Terbang Antarabangsa Kota Kinabalu, di dalam Daerah Kota Kinabalu, di dalam Negeri Sabah, telah didapati mengedar dadah berbahaya iaitu Methamphetamine
G seberat 4396.7 gram dan dengan itu kamu telah melakukan kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama dan dibaca bersama seksyen 34 Kanun Keseksaan.

Prosecution's Case

H **[5]** On 21 May 2016, Penguasa Kastam Puan Nurul Farhana binti Rusla (PW6) together with her officers were carrying out observation and examination duties at the Arrival Hall of Terminal 2 at Kota Kinabalu International Airport (KKIA) from 1400 hours to 2200 hours. The appellant landed at KKIA from Kuala Lumpur *via* flight AK5112. As the appellant
I stepped out of the escalator at the baggage reclaim area, he stopped and stood focusing his sight at the baggage security clearance area (BSCA).

[6] PW1, a customs officer who was on duty observed the appellant and found the appellant's behavior wanting/suspicious. PW1 trailed the appellant who then proceeded towards the toilet, made a phone call and entered the toilet cubicle. After exiting the toilet cubicle, the appellant walked out of the toilet heading straight towards carousel D and reclaimed a plastic-wrapped box (P33) from the carousel. PW1 continued to trail the appellant.

[7] PW1 next saw the appellant after picking up P33, placing P33 on the floor and checking the tag affixed to P33 against a boarding pass (P7) that he was holding in his other hand. Subsequently, the appellant placed P33 on a trolley and strode towards the BSCA. PW1 observed the appellant queuing in line anxiously focusing his sight at the security clearance procedure.

[8] PW1 then notified his colleagues PW2 and PW3 to be heedful of the appellant and P33 during scanning. At that time, PW2 and PW3 were supervising another customs officer who was manning the screening machine counter. As P33 was being scanned, PW1 saw PW2 directed the appellant to bring P33 to another counter, and there to open P33. PW1 saw the appellant ploddingly and hesitantly unwrapped the plastic from P33.

[9] According to PW1, PW3 later escorted the appellant back to carousel D, supposedly to retrieve his box. None were found even after all the passengers from the same flight had reclaimed their respective baggage, luggage and/or boxes. PW1 saw PW3 next directed the appellant together with P33 and his personal bags to the CCP office. PW1 followed from behind and later returned to his normal duties.

[10] PW2 who was on duty with PW3 testified that aside from supervising another customs officer who was manning the scanning machine counter, his duty as a "user" on 21 May 2016 at about 3.30pm was to direct passengers to go forward to the scanner machine counter. As P33 made its way through the scanning machine, PW2 saw a suspicious image inside P33 displayed on the scanning monitor. Minding PW1's earlier remarks, PW2 then directed the appellant to bring P33 along with him to the examining counter on the opposite side to the scanning machine counter.

[11] At the examination counter, PW2 directed the appellant to unwrap the plastic from the box. PW2 gave the appellant a small knife to open P33. According to PW2, the appellant looked anxious when directed to open the plastic from the box, and while he was opening P33 with the knife given, his hands were shivering.

[12] These were found inside P33 when opened – there were two packets of "Snek Mi". Upon taking out these two packets, PW2 saw there were several other packets (6) wrapped in newspaper inside P33. Although instructed, the appellant refused to unwrap the newspaper packing, explaining that P33 was not his.

[13] Following the appellant's refusal, PW2 requested for the appellant's boarding pass and the luggage tag which was affixed to P33. Upon checking, the boarding pass proved to be registered under the appellant's name while P33 was of a different name. PW2 then handed the matter over to his colleague, Azamaain bin Kenit (PW3).

[14] PW3 then queried the appellant as to why he took P33 knowing that it did not belong to him. The appellant's reply was that P33 looked similar to his box and said that his box could possibly be at the conveyor belt. PW3 then escorted the appellant to carousel D to check but none was found. Following that, PW3 directed the appellant to pick up P33 and the rest of his belongings and escorted the appellant to the CPP's office for further action.

[15] Inside the CPP's office, PW3 instructed the appellant to sit on the sofa and to place P33 together with his bags beside the sofa. PW3 then informed PW6, his supervisor on the matter. PW6 informed the same to Ketua Cawangan Kastam KKIA. PW6 inspected the contents of P33 and instructed two officers, Salestine Sujah and Connie Chew to assist her. Inside P33, there were several packages (6) wrapped in newspaper. PW6 instructed Salestine to unwrap one of the packets. Upon unwrapping, PW6 found (1) "Guanyinwang" tea plastic and inside it to contain another transparent plastic containing clear crystal substance. Using the Trunarc device, Salestine tested the clear crystal substance and found it to be methamphetamine.

[16] After the appellant was cautioned, the appellant replied that P33 did not belong to him but to his friend Woo Kah Paul who according to the appellant was outside the arrival hall. PW6 later confirmed that the luggage tag affixed to P33 was in Woo Kah Paul's name.

[17] A body search was conducted and no incriminating material was found on the appellant. Subsequently, P33 was repacked, covered and sealed. The appellant and the seized goods were brought to Wisma Kastam, Kota Kinabalu and on arrival at 6.25pm at the meeting operation room there, the necessary paperwork was processed including the requisite receipts and documents, photograph taking and the labelling of the seized items and the weighing of the subject matter. The appellant was in the meanwhile observed to be silent and looking nervous with a pale face. PW3 remained with the appellant till the arrival of the narcotics officers called by PW6.

[18] Thereafter, PW6 handed over the appellant and the seized items to PW7, the investigating officer for further investigation.

[19] PW7 testified as follows. According to PW7, earlier in the evening of 21 May 2016, his Penolong Kanan Pengarah Kastam II, Bahagian Siasatan instructed him to be on standby at his office to receive a drugs-related case from KKIA. It was only about 12.30am of 22 May 2016 when he eventually

received the handing over from PW6. He placed the seized items inside his steel cabinet in his office. He had sole custody of the key to the steel cabinet. He then instructed the appellant to be placed at the lock-up at Balai Police Kepayang. The next day, he brought the appellant to court for further remand under s. 259 of the Criminal Procedure Code.

[20] He then prepared the necessary documentation and conducted investigations as summarised below:

23 May 2016	The appellant was brought to Wisma Kastam and the Forensics team came to Cawangan Siasatan, Kota Kinabalu to process the 'finger dusting lifting, on the exhibits seized. Fingerprint was found on the plastic packet branded "GUANYINWANG" marked A3(a) & A4(a) and on the packet of "Snek Mi" but the result proved negative due to lacking in property (character).
26 May 2016	Exhibits P9, P12, P15, P18, P21 & P24 were placed inside a box labelled "F" (P8) and sent to PW5 at the Chemistry Department for drug analysis. A receipt (P37) was received. The result proved positive containing 4396.7g of methamphetamine. PW4 conducted the analysis and the chemist report (P28) dated 29 September 2016 was tendered at trial. The sending and receiving of P33 was without incident, they were said to be sealed by the respective departments and were intact.
26 May 2016	At about 4.33pm an envelope labelled "H" and a box labelled "G" (P54) were sent to pegawai sains at the Chemistry Department for DNA analysis. P54 and the DNA report (P53) were received on 12 October 2016.

All exhibits were later sent to "Stor Bahagian Penguatkuasaan, Sepanggar" and taken out by PW7 to be brought to court.

[21] These were PW7's investigations into the character of Woo Kah Paul (Woo) and the role he played in the instant case:

(i) Upon checking the manifest as well as the baggage list with Air Asia AK5112, PW7 found that such a person existed. Woo however did not make any claim for P33 at the lost & found counter.

(ii) On 22 May 2016, PW7 sought the assistance of Jabatan Imigresen Malaysia to assist by obstructing Woo from leaving Sabah, and to obtain details of his movement in and out of Sabah. Jabatan Imigresen responded with the information that there was no record of Woo leaving or exiting Sabah since the last time he landed in Sabah, that is, on 21 May 2016.

(iii) PW7 applied to Malaysia Airports Berhad (MAB) for a copy of the CCTV recording on 21 May 2016 at both KKIA and KLIA, T2.

(iv) PW7 also applied to Cyber Security Malaysia to analyse the appellant's mobile phone for any information that may assist in the investigations. This proved negative.

(v) PW7 also applied to Jabatan Pendaftaran Negara for Woo's status and latest address. The department's reply (P56) revealed an address at Taman Orkid, Cheras, Selangor which upon investigation was found to be a non-existent address.

Findings Of The Trial Court

[22] At the end of the prosecution's case, the learned trial judge applied the law on double presumption under s. 37A, that both ss. 37(d) and 37(da) of the Dangerous Drugs Act 1952 may be relied on by the prosecution. However, before the two presumptions may be triggered, the prosecution had to adduce "concrete facts" and prove its case beyond reasonable doubt that the appellant had custody and control of the drugs in question.

[23] On the "concrete facts" adduced by the prosecution, the learned judge invoked the presumption under s. 37(d) of the Act – that the appellant is deemed to have in his possession the impugned drugs and to have known the nature of such drugs until the contrary is proven after accepting the following evidence.

[24] First, the learned judge accepted the evidence of the chemist (PW4) and found the evidence not inherently incredible, that the drugs seized was the type, nature and weight as testified by PW4 and as set out in his report (P28).

[25] As for the element of possession, the learned judge held that the prosecution was entitled to rely on the presumption of possession and knowledge under s. 37(d) of the Act, that the prosecution need only establish positive evidence that the appellant had custody and control over P33 at the material time. Therefore, it was presumed that the appellant was in possession of the impugned drugs P9, P12, P15, P18, P21 and P24 (transparent packet containing crystalline substance labelled A3(b) to A8(b) and that the appellant knew the nature of the impugned drugs contained inside those exhibits.

[26] The learned judge found that the appellant had direct custody and control over P33 at the material time because:

(i) the appellant was alone from the time he stepped onto the escalator at the baggage reclaim area till the time he was stopped by PW2;

(ii) PW1 had observed the appellant picking up P33 from carousel D, placing P33 on the floor, checking and comparing the luggage tag (P47) of P33 with the cut portion of the boarding pass (P7) that he held in his hand; placing P33 thereafter on a trolley and proceeding to walk and push the trolley towards the security clearance area;

(iii) that the appellant's response of having taken P33 mistakenly as it looked similar to his was not truthful in view of PW1's observations as stated above.

[27] On the matter of knowledge, the learned judge found from the facts coupled with the behavior of the appellant as described by the prosecution witnesses implied that the appellant had knowledge of the presence of P9, P12, P15, P18, P21 and P24 (transparent packet containing crystalline substance labelled A3(b) to A8(b) found inside P33. The inference was imported as the appellant had no reason to go to carousel D since he did not check in any luggage; yet, he did the same thus inferring that P33 belonged to him. The appellant had conveniently changed his story to one about P33 belonging to Woo and hiding behind the defence of "innocent carrier" when his *modus* was found out.

[28] Her Ladyship was of the view that the appellant had devised a clever scheme and *modus* to evade detection and to exculpate himself should he be found out. According to the learned judge, the appellant had no reason to go through the charade of checking P46 against P7 when he already knew that the two did not match. Lastly, Her Ladyship noted that the appellant's conduct was suspicious as testified by PW2, that the appellant looked nervous and that his hands were shivering when he was asked to open P33; that the appellant sat silently with a pale face when he was taken to the CPP's office.

[29] The learned judge went on to further presume that the appellant is trafficking under s. 37(da) of the Act in light of the weight of the drugs recovered from the appellant, and because the drugs were packed in such a way to avoid detection by placing the drugs inside a tea packet as if the package contained tea produce. Consequently, the learned judge found that the prosecution had proven a *prima facie* case against the appellant as per the charge and that the presumptions had not been rebutted. The appellant was then ordered to enter his defence on the charge preferred against him.

Defence Case

[30] In essence, the appellant's defence is that P33 did not belong to him but to Woo. The appellant first met Woo three to four months earlier when Woo came to Kuala Lumpur looking for car accessories. The appellant himself who hails from Miri, Sarawak was working as a mechanic before his

arrest. Woo had told the appellant that he worked as a car accessories fitter. The day before he left for Kota Kinabalu, he mentioned to Woo that he was leaving for Kota Kinabalu and Woo decided to follow him without telling him why. The appellant was in Kota Kinabalu looking for car accessories upon his father's request; his father wanted him to look for Isuzu engine spare parts to be sent to Sarawak.

[31] Although both of them did not check-in or went through the immigration counter together, they sat next to each other on the flight. The appellant claimed that they did not have any conversation with each other as he slept throughout the flight. As for luggage, he did not check in any. However, when he was on the way out of KKIA, he had stopped and had entered the toilet when he received a call from Woo. Woo told him that he had forgotten to reclaim his box (P33) at the conveyor belt and Woo had asked him for a favour to pick up the same for him. Woo told him that he could not return to the "reclaim baggage area" because he had already come out of the arrival exit and that he would not be allowed to re-enter. Woo described the box to him and had told him that the box contained dried meat.

[32] And, so, when the customs officer had asked him about the contents of P33, he had replied that it contained "eatery items" and had thus agreed to open the box with the knife provided by the customs officer when asked to by the officer. According to him, the luggage tag was still attached to the box (P33) when he carried it to the scanner machine.

[33] As for the contents of P33 when P33 was opened, the appellant claimed that he had informed the customs officer that he wanted to call Woo. Instead of allowing him to do so, the customs officer grabbed and seized his handphone. He had also informed the officer that Woo was outside the arrival hall, waiting for him. This was also ignored and the officer did not go out to look for Woo.

Findings Of The Trial Judge

[34] At the conclusion of trial, the learned judge found the prosecution witnesses to be honest and credible who had withstood vigorous cross-examination by a very experienced and competent counsel; that they were members of law enforcement agencies who did not know the appellant or bear ill-will towards him, and that they were merely discharging their duties. By comparison, the learned judge found the defence to "be highly improbable" for the following reasons:

(i) Although Woo was not a fictitious character, the court found:

(a) the appellant "giving mixed signal as to their relationship"; and that the appellant was "coy about his relationship with Woo so as to delude the authorities to conclude that they formed common intention to traffic the subject matter in this case"; and

(b) that in actual fact, both Woo and the appellant had intentionally planned the sequences of the incident (as disclosed at the *prima facie* stage) so as to fool the authorities but for the unsuspecting "rover" (PW1) and non-fool proof of their plan.

[35] The learned judge thus found that the defence had failed to rebut the presumption on a balance of probabilities and to raise a reasonable doubt on the prosecution case. The appellant was thus convicted and sentenced to death; hence this appeal.

The Appeal

[36] Learned counsel for the appellant canvassed five grounds of appeal before us:

(i) that the learned judge had breached the double presumption rule whereby she had invoked both presumptions under ss. 37(d) and (da) of the Dangerous Drugs Act 1952 to hold at the end of the prosecution case that the appellant had possession and was trafficking in the drugs;

(ii) that the learned judge had misdirected herself when she made uncertain findings on the elements of possession and trafficking thereby prejudicing the appellant;

(iii) that the learned judge had erred in law and in fact in respect of the element of common intention when Her Ladyship did not make a finding at the end of the prosecution case on whether the appellant had common intention with Woo to traffic the drugs; and when there was no evidence of common intention adduced by the prosecution at the end of the prosecution case;

(iv) that the learned judge had misdirected herself when she failed to consider and appreciate the appellant's defence at the end of the trial according to trite law; and

(v) that the learned judge had misdirected herself when she failed to consider at the end of the trial as to whether the appellant had rebutted the presumption of possession under s. 37(d) of the Act or alternatively the presumption of trafficking under s. 37(da) of the Act.

[37] The Federal Court recently in the decision of *Alma Nudo Atenza v. PP & Another Appeal* [2019] 5 CLJ 780 declared that s. 37A of the Dangerous Drugs Act 1952 to be unconstitutional. In their written submissions, learned DPP contended that the Federal Court's decision has no application since the High Court decision under consideration was decided before the Federal Court rendered its decision. At the hearing of this appeal, learned DPP conceded that the decision of the learned judge that the appellant was guilty as charged was therefore erroneous, unsafe and ought to be set aside, in view of the invocation of double presumption against the appellant under s. 37(d) and s. 37(da) of the Act.

[38] However, the learned DPP urged this court to reduce the charge to one of a lesser offence of possession under s. 39A(2) of the Act, to find the appellant guilty on this lesser charge and to sentence him to a term of imprisonment between 20 to 25 years in view of the weight of the drugs. Learned DPP relied now on the single presumption under s. 37(d) as laid down in *Muhammed bin Hassan v. PP* [1998] 2 CLJ 170; [1998] 2 MLJ 273.

[39] We declined.

[40] First, on the matter of the Federal Court decision in *Alma Nudo Atenza v. PP*. The learned judge had indeed invoked both presumptions under s. 37(d) and (da) of the Act. We are of the firm view that the Federal Court decision applies to the present appeal and the concession of the learned DPP supports this conclusion. We are obliged to apply the law as it stands and as decided by the apex court; it is not a matter of retrospective effect but an application of the law as it stands to all pending proceedings. The instant appeal remains a pending proceeding for so long as it is still processing through the appellate process and is thus subject to the rigours of *inter alia* the doctrine of *stare decisis* and the principle of prospective overruling. See *Veheng Global Traders Sdn Bhd v. AmGeneral Insurance & Anor And Another Appeal* [2019] 7 CLJ 715; *Ling Peek Hoe & Anor v. Ding Siew Ching & Another Appeal* [2017] 7 CLJ 641; [2017] 5 MLJ 385; *Public Prosecutor v. Dato' Yap Peng* [1987] 1 CLJ 550; [1987] CLJ (Rep) 284; [1987] 2 MLJ 311. On this ground alone, the appeal must be allowed and the conviction and sentence be set aside.

[41] We add that the learned judge had erred in the deployment of the terms "actual possession", "carrying" and "transporting" in the manner as submitted by learned counsel for the appellant thereby causing prejudice to the appellant. The learned judge had made inconsistent findings on possession and trafficking, using the terms interchangeably to the prejudice of the appellant. The law requires the trial judge to make definitive and certain findings on the element of possession and trafficking at the end of prosecution case (see *Seyedalireza Seyedhedayatollah Ehteshamiardestani v. PP* [2014] 4 CLJ 406; [2014] 6 MLJ 408; *Saeid Reza Mohammadi Mohammad lwn. PP* [2016] 1 LNS 303; [2016] 4 MLJ 22; *Felix King v. PP* [2019] 2 CLJ 209; [2019] 1 MLJ 243) as this impacts on the evidential burden that has to be discharged by the appellant at the end of the trial.

[42] As for the alternative charge, we are obliged to nevertheless consider the defence of innocent carrier in the facts and circumstances as relied on by the appellant. Having done so, we unanimously, found from the totality of evidence that the defence of innocent carrier had been successfully established on the facts and law by the appellant thus not only rebutting the presumption under s. 37(d) relied on by the prosecution but successfully

demolished the prosecution's case. Under the circumstances, not only is the conviction of the appellant under the original charge unsafe, so would be the alternative charge now urged upon us by the prosecution. These are our reasons.

[43] In our minds is the role played by Woo, a matter which is directly related and relevant to the defence of innocent carrier. Having considered the reasons of the learned judge, we find that the learned judge had in fact failed to deal with this defence at the end of trial, as she was required in law to do. All that the learned judge did was to disbelieve the appellant, suspecting that the appellant was hiding his real relationship with Woo. Having called for the appellant's defence, it was the trial judge's duty to evaluate that defence of innocent carrier to see if there was in fact evidence to support that defence. What the learned judge did instead was to focus on the issue of common intention to the exclusion of consideration of this defence. We find that the learned judge had erroneously failed in that regard occasioning thereby a miscarriage of justice which we are obliged to put right.

[44] The defence of "innocent carrier" was explained in *Munuswamy Sundar Raj v. PP* [2016] 1 CLJ 357; [2015] 6 MLJ 214 by the Federal Court in the following terms:

> A defence of innocent carrier refers to a state of affairs where an accused person acknowledges carrying, for example, a bag or a box as in the case before us, containing the dangerous drugs but disputes having knowledge of the drugs. Whether it will succeed or not would very much depend on the facts of each case.

[45] Since the defence was that he was an innocent carrier, the learned judge was obliged to consider the issue of deliberate action and whether there was wilful blindness – see *Pendakwa Raya v. Herlina Purnama Sari* [2016] 1 LNS 1855; [2016] MLJU 1824. In the present appeal, the learned judge was required to consider whether the appellant was truly innocent or was he being wilfully blind to the realities around him. This defence of innocent carrier refers to a state of affairs or a set of factual circumstances where the appellant acknowledges that he was carrying P33 or has explained how he has come to be carrying P33, but has denied knowledge of the drugs found in P33. In the present appeal, the learned judge was required to examine the full circumstances to see if the defence has been borne out by the evidence led and relied on by both the prosecution and the appellant, and that the appellant had not been willfully blind. The amount of drugs recovered does not *ipso facto* deprive the appellant of this defence – see the Federal Court decision in *Soorya Kumar Narayanan & Anor v. PP* [2012] 9 CLJ 141; [2013] 1 MLJ 1.

[46] Given that the existence of Woo is not in doubt, that the prosecution had accepted that this individual exists, and that from their inquiries, Woo is still in Sabah or rather has not left Sabah, it must surely mean that Woo travelled with the appellant as claimed by the appellant. Since Woo was on the same flight as the appellant, this must also mean that he had landed in KKIA as did the appellant, and had traversed the same areas of KKIA as the appellant, save that he did not pick up his box (P33) which he had checked in at KLIA2, and which according to the appellant, Woo had sought his favour to pick up for him for the reasons relied on by the appellant.

[47] The evidence shows that the appellant had made known the existence of Woo at the earliest opportunity and had done so repeatedly. He had Woo's handphone number on his own handphone and had requested to call Woo, which was refused. No explanation was proffered for this refusal. He had not only informed PW2 but also PW6 that P33 belonged to Woo and that Woo was waiting outside at the arrival hall for P33. The appellant had further described Woo, explaining that he was wearing a black long-sleeved T-shirt with the number 9 on the right shoulder. Despite being told, none of the customs officers checked out the appellant's explanation, especially to look for Woo. This is confirmed by the evidence of PW2, PW6 (see pp. 50 to 54, 56 and 57 in the records of appeal).

[48] The appellant's flight landed at 3.40pm in the afternoon and it was not until 6.25pm that the appellant was brought to Wisma Kastam, Kota Kinabalu and at 12.30am that the investigations were handed over to PW7. The time lapse and the multiple occasions where the appellant raised the matter of Woo clearly indicate that the customs officers were aware very early on of the existence of Woo and had ample opportunity to verify the appellant's claim, yet failed to do so with no explanation or reasonable explanation given. In fact, this trail of relevant evidence was not investigated till some four months later (see pp. 144 to 173 of the record of appeal), long after it had gone quite cold. Thus, learned DPP's submission that the appellant had only raised the matter of Woo somewhat late is, as we can see, quite clearly not supported at all by the evidence; that it was the ineptness of the investigation that is belated and wanting, and for which the appellant cannot be blamed, worse to be found guilty as charged.

[49] The learned judge failed to consider this vital factor; that the presence of a third person other than the appellant was simply not verified; and this is highly relevant to the defence of innocent carrier as relied on by the appellant. Had these pieces of evidence been considered and evaluated as we have now done, Her Ladyship would have found the appellant's defence both credible and probable. Although the prosecution witnesses had each recounted the events on that fateful afternoon, none of them explained or could explain why they did not look for Woo, especially when the details on the luggage tag (P47) and the boarding pass (P7) did not match.

[50] Further, the learned judge had clearly misunderstood the reason why the appellant was checking P47 against P7 and why he was escorted back to carousel D by PW3. The learned judge was of the view that there was no logical reason for the appellant to go to carousel D to take P33 since he did not check in any luggage. Despite knowing that, the appellant consciously went to carousel D to retrieve P33. According to the learned judge, the appellant's "action of purposely checking P47 against P7 was to give impression to any observing customs officer that the said P33 belongs to him".

[51] The very defence of the appellant was that he was asked to retrieve P33 by Woo, and Woo had called him after he had left the security clearance area. The existence of this phone conversation is actually confirmed by PW1. The explanation offered by the appellant as to why he was checking P47 against P7; that it was to confirm the flight details are plausible and reasonable. As for going back to carousel D, the appellant had explained that it was to check if there was any other box belonging to Woo, not to check for a box belonging to him since he did not check in any. Since this (P33) was the only box bearing Woo's details, this was indeed Woo's box. This was confirmed by PW3 – see p. 64 of the record of appeal.

[52] As for P33 itself, the prosecution had led evidence that the appellant did not check in any luggage. Hence, P33 was not checked-in by the appellant. It was checked in by Woo as was shown by the manifest. P33 at the very least, belonged to Woo. The issue then is whether the appellant was aware of the contents of P33 or had knowledge of the drugs seized, the very material question that the learned judge was required in law to resolve. For the same reasons as set out above, we find that the appellant cannot be said to have been wilfully blind as to the obvious and to the contents of P33. His explanation is supported by the evidence led, and the learned judge's conclusion that the appellant had devised a clever scheme and *modus* to evade detection and to exculpate himself should he be found out are speculations at best, not supported by any evidence. Even on the matter of common intention, we do not find that proved, and learned DPP is not in any case, urging that upon us in this alternative charge.

[53] At the hearing of this appeal, as pointed out earlier, learned DPP's real contention is that the name of Woo was given belatedly, that there was delayed disclosure. In the Federal Court decision of *Teng Howe Sing v. PP* [2009] 3 CLJ 733, there was a five-day delay in disclosing the real identity of "Ho Seng" to the police, and even then, the existence of "Ho Seng" was challenged. That is entirely different from our instant appeal where not only does Woo exist, that fact is admitted by the prosecution; the evidence led by the prosecution show that P33 was checked in by Woo; that the luggage tag

belonged to Woo; that the appellant did not check in any luggage himself; that the appellant was seen on his handphone prior to approaching carousel D to retrieve P33; that the appellant had informed the customs officers at first and every opportunity as to the ownership and existence of Woo.

Conclusion

[54] For all the reasons set out above and having considered the submissions of learned counsel for the appellant and learned DPP, and having taken on board the concession by the learned DPP that there was an application and reliance on the double presumption by the learned judge, and following the recent decision of the Federal Court in *Alma Nudo* (*supra*), such invocation being unconstitutional, the charge of trafficking cannot stand.

[55] As for the alternative charge under s. 39A(2) of the Act, we find that the defence of innocent carrier made out by the appellant both on the facts and in law. Consequently, the appeal is allowed and the decision of the High Court is set aside together with the conviction and sentence imposed by the High Court. The appellant is accordingly acquitted and discharged.